

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 9, 2005 Session

DERICK BAILEY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 99-B-1017 Seth Norman, Judge

No. M2004-02434-CCA-R3-PC - Filed September 7, 2005

The petitioner, Derick Bailey, appeals from the Davidson County Criminal Court's denial of post-conviction relief. Presenting issues of trial error and the ineffective assistance of counsel, the petitioner appeals. We affirm the post-conviction court's order.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Charles E. Walker, Nashville, Tennessee, for the Appellant, Derick Bailey.

Paul G. Summers, Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The Davidson County Criminal Court convicted the petitioner of first degree murder in 2000. As revealed by this court's opinion in the petitioner's direct appeal, *see State v. Derick Bailey*, No. M2001-02411-CCA-R3-CD (Tenn. Crim. App., Nashville, Apr. 15, 2003), *perm. app. denied* (Tenn. 2003), the petitioner was convicted of both premeditated murder and felony murder of Timothy Chandler. On December 27, 1998, the petitioner was driving his Cadillac accompanied by his identical twin brother, Erick Bailey, Alvin Hall, and Jevon Garrison. The petitioner drove to the vicinity of a gasoline station where the victim, Timothy Chandler, had been fueling his car, a gold Camaro with expensive custom wheels. Erick Bailey apparently shot and killed the victim and took the Camaro. The petitioner followed him in the Cadillac. Within an hour and a half, the Camaro was found stripped of its tires, wheels, and radio. Later, the petitioner gave a statement to the police, which this court summarized as follows:

[O]n the evening of the shooting, [the petitioner], along with his brother Erick and two cousins, drove to the Aztec store in the [petitioner's] blue Cadillac. While they were in the parking lot, the [petitioner] heard a shot and immediately drove around the back of the store. The [petitioner] saw the Camaro leaving, but did not see the driver. The [petitioner] admitted that he followed the Camaro onto Dickerson Road, then turned onto another street where he left his cousins. The appellant stated that he did not know what happened to his brother. The appellant maintained that he spent that night at a motel with his girlfriend, but he could not recall the name of the motel or the name under which he had registered.

Id., slip op. at 4. When the officers examined the petitioner's blue Cadillac, they "noticed in the back seat what appeared to be the impression of a tire." *Id.* A forensic examination of the impression in the seat indicated a particular type of tire. *Id.*, slip op. at 5. The evidence showed that the type of tire was unusual and that the victim had ordered and purchased a set of that type and had mounted them onto the Camaro. *Id.* Erick's thumbprint was found on an object inside the Camaro. *Id.*

Dr. John E. Gerber, a forensic pathologist, testified at trial regarding the autopsy of the twenty-five-year-old victim. The autopsy verified that the victim died as the result of a gunshot wound to the chest. The bullet perforated the heart, aorta, liver, and spine. Dr. Gerber detailed how the bullet entered the victim's chest, traveled through the pericardium sac around the heart, and passed through the right side of the heart, the liver, and the aorta. The bullet continued through the vertebrae, injuring the spinal column before exiting the body. The injuries caused massive internal bleeding. Dr. Gerber also explained the lack of blood at the crime scene, noting that with this type of injury, the bleeding was internal rather than external. The blood filled the victim's abdominal region and the area where the lung had collapsed.

Dr. Gerber stated that an examination of the victim's clothing revealed the presence of soot or stippling, an indication that the gun was fired from six inches to two feet away from the victim.

The [petitioner] testified on his own behalf at trial. He admitted that on the evening of December 27, 1998, he was with his twin brother, Erick, and his cousins, Hall and Garrison. The group drove down Dickerson Road and eventually got into the drive-thru line at a Taco Bell restaurant located next to an Aztec store. Erick got out of the [petitioner's] Cadillac, expressing his intention to go to the

Aztec store. Due to the long line at the drive-thru, the [petitioner] got out of line and “went to the Aztec to wait for [Erick].” When the [petitioner] parked the Cadillac, Hall got out of the car and went into the store to purchase a drink, returning shortly thereafter. Garrison, who had remained in the car, stated that he “heard something.” The [petitioner] immediately drove around the back of the store to look for Erick, thinking that perhaps Erick was confused about where he would be picked up. At the rear of the store, the [petitioner] saw a body on the ground near the gas pumps. He saw the Camaro “exiting out” but was unable to see the driver.

The [petitioner] did not locate his brother but decided to leave because he was frightened. The [petitioner] drove out of the parking lot and took his cousins to Westchester, several miles away. He and his girlfriend then spent the night in a motel. The [petitioner] maintained that he had never been to Jackson Road. When the [petitioner] realized that a warrant had been issued for his arrest, he voluntarily surrendered to the police and consented to a search of his blue Cadillac.

Id., slip op. at 5-6.

The petitioner was convicted of one count of felony murder and one count of premeditated first degree murder. On appeal, this court found the evidence insufficient to support a conviction of premeditated murder, but we affirmed the conviction of felony murder. *Id.*, slip op. at 6-9; *see* Tenn. Code Ann. § 39-13-202(a)(2) (2003).

The petitioner filed the instant petition for post-conviction relief, claiming that (1) the trial court erred in not instructing the jury on the natural and probable consequences rule; (2) he was denied the right to confront a witness against him when Dr. Gerber was allowed to testify about the victim’s autopsy, and (3) he was denied the effective assistance of counsel.

In the post-conviction evidentiary hearing, trial counsel testified that the state’s theory of the petitioner’s guilt was complicity. *See id.* § 39-11-402 (establishing criminal liability for the crimes of another). Counsel did not recall that the trial court instructed the jury on the natural and probable consequences rule.

Counsel recalled that the victim’s autopsy was performed by “Dr. Levy.” Because Dr. Levy was unavailable at the time of trial, counsel was aware that Dr. Gerber would testify about the autopsy report. Counsel testified, “I’m certain that we waived the fact that Dr. Gerber could testify for Dr. Levy.” Counsel explained that “[t]he cause of death was not an issue.”

Counsel testified that neither the absence of an instruction on the natural and probable consequences rule nor the confrontation issue was raised on appeal.

Counsel testified that he discussed with the petitioner the perils associated with an accused testifying in his criminal trial. Counsel recalled that the petitioner opted to testify and that “the jury believed a couple of things that hurt his case.”

Counsel testified that the theory of the defense was that the petitioner was insufficiently connected to the homicide and robbery to render him criminally responsible. Counsel surmised that one reasonable interpretation of the facts is that the petitioner did not know of his brother’s plans, if any, to shoot or rob the victim, that he merely waited in his car for his three passengers to return, and that when Erick Bailey did not return, he drove around the station to look for him. By that time, the victim had been shot, and the Camaro was leaving the scene.

The petitioner testified in the evidentiary hearing that, prior to the trial, his trial counsel failed to discuss theories of defense with him and failed to explain the potential risks and benefits of his testifying in his own defense. He testified in the evidentiary hearing that he did not wish to testify at trial, counsel did not explain that he had a right not to testify, counsel did not prepare him to testify, and he was surprised when counsel called him to the stand.

The petitioner testified that counsel declined to exploit a possible bias of Alvin Hall as a witness for the prosecution; the petitioner wanted counsel to reveal to the jury that Mr. Hall’s father was on probation and that the state “used his father to put him on the stand . . . against me.”

The post-conviction court entered written findings of fact, conclusions of law, and its adjudication denying post-conviction relief.

*I. Trial Error: Failure to Instruct on the
Natural and Probable Consequences Rule.*

The petitioner claims that, in his case wherein the state relied upon a theory of vicarious liability, the trial court committed error in failing to instruct the jury on the natural and probable consequence rule. In *State v. Howard*, 30 S.W.3d 271 (Tenn. 2000), our supreme court said,

[T]o impose criminal liability based on the natural and probable consequences rule, the State must prove beyond a reasonable doubt and the jury must find the following: (1) the elements of the crime or crimes that accompanied the target crime; (2) that the defendant was criminally responsible pursuant to Tennessee Code Annotated section 39-11-402; and (3) that the other crimes that were committed were natural and probable consequences of the target crime.

Id. at 276. The high court ruled that the trial court in *Howard*, a premeditated murder case, committed reversible error in failing to instruct the jury on the natural and probable consequences rule. *Id.* at 277.¹

Although we will revisit the issue when we address the petitioner's claims of ineffective assistance of counsel, we hold that the issue of trial error in omitting an instruction on the natural and probable consequences rule has been waived. Tennessee Code Annotated section 40-30-106(g) provides that a ground for post-conviction relief "is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented," subject to certain exceptions inapplicable in the present case. Tenn. Code Ann. § 40-30-106(g) (2003). The issue could have been, but was not, presented to the trial court in the form of an objection to the instruction omission or a request for a special instruction, through the motion for a new trial, and to this court in the direct appeal of the conviction. Thus, the issue has been waived.

II. Trial Error: Denial of Right of Confrontation.

The petitioner claims that the trial court erred in allowing Dr. Gerber to testify about the report of the victim's autopsy. Apparently, Dr. Gerber testified in the stead of Dr. Levy, who performed the autopsy. The petitioner posits that the failure of Dr. Levy to present the autopsy information violated his constitutional right to confront a witness.

Although we will revisit the issue when we address the claims of ineffective assistance of counsel, we hold that the claim of trial error in admitting the testimony of Dr. Gerber was waived. Not only was the issue not timely presented to a court of competent jurisdiction, *see id.*, but also the petitioner's counsel affirmatively waived the issue at trial for strategic or tactical reasons, *see* Tenn. R. Evid. 103(a)(1) ("In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context. . . ."); Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

III. Ineffective Assistance of Counsel.

The petitioner posits that his trial counsel was ineffective based upon counsel's failure to: (1) present the issue of the trial court's failure to instruct the jury on the natural and probable consequences rule; (2) present the issue of a violation of confrontation rights attendant in Dr. Gerber's testimony; (3) advise and prepare the petitioner for testifying at trial; (4) press the trial court to require the state to elect between charges of premeditated murder and felony murder; (5) effectively cross-examine witness Ronald Eakes; and (6) properly cross-examine witness Alvin Hall.

¹ *Howard* was filed approximately five weeks before the petitioner's trial.

The post-conviction petitioner bears the burden of establishing, at the evidentiary hearing, his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (2003). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). An appellate court is bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

The Sixth Amendment of the United States Constitution and Article I, section 9 of the Tennessee Constitution both require that a defendant in a criminal case receive effective assistance of counsel. *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). When a defendant claims ineffective assistance of counsel, the standard applied by the courts of Tennessee is "whether the advice given or the service rendered by the attorney is within the range of competence demanded by attorneys in criminal cases." *Hicks*, 983 S.W.3d at 245.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the United States Supreme Court defined the Sixth Amendment right to effective assistance of counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and must demonstrate that counsel made errors so serious that he was not functioning as "counsel" guaranteed by the Constitution. *Id.* at 687, 104 S. Ct. at 2064. Second, the petitioner must show that counsel's performance prejudiced him, that the errors were so serious as to deprive the defendant of a fair trial, and call into question the reliability of the outcome. *Id.*, 104 S. Ct. at 2064.

A reviewing court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must evaluate counsel's performance from counsel's perspective at the time of the alleged error and in light of the totality of the evidence. *Id.* at 695, 104 S. Ct. at 2070. The petitioner must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*, 104 S. Ct. at 2070.

To establish ineffective assistance of counsel in Tennessee, evidence stemming from a failure to prepare a sound defense or present witnesses must be significant. However, a reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the prejudice requirement of *Strickland*. *Hicks*, 983 S.W.2d at 246.

A. Natural and probable consequences instruction.

As we have mentioned, *Howard* imposed a duty on a trial court to instruct the jury on the natural and probable consequences rule in a premeditated murder case when vicarious liability is a theory of the defendant's guilt, and *Howard* was filed prior to the petitioner's trial.

That said, we can discern no prejudice in the absence of the instruction on the count of premeditated murder because this court held that the evidence was insufficient to support the conviction of premeditated murder. We reversed the conviction and dismissed that charge. Thus, on the premeditated murder count, the petitioner has not been prejudiced by counsel's failure to present the instruction issue to the trial court and/or to this court.

Concerning the felony murder count which was affirmed on appeal, this court has previously held that *Howard* does not apply to a charge of felony murder. *State v. Winters*, 137 S.W.3d 641, 659 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. 2004). Given this legal context, trial counsel did not perform deficiently in failing to raise the issue at trial or on appeal, and the petitioner was not prejudiced by the failure.

B. Confrontation violation claim.

We have determined above that trial counsel affirmatively waived the issue of whether Dr. Gerber should have been allowed to testify about the victim's autopsy report. Even if this action could be viewed as deficient performance, which we doubt, the petitioner did not show by clear and convincing evidence that he was prejudiced. We agree with trial counsel's assessment during the evidentiary hearing; the cause of death of the victim was not in issue. The petitioner has cited no component of Dr. Gerber's testimony that was in controversy, and we know of none. Counsel did not render ineffective assistance on this issue.

C. Issues surrounding the petitioner's trial testimony.

This issue was presented in the petitioner's brief in a nine-line argument which contained no citation to authority. Accordingly, the issue is waived. *See* R. Tenn. Ct. Crim. App. 10(b) ("Issues which are not supported by argument, citation to authorities . . . will be treated as waived in this court.").

D. Failure to secure election between homicide counts.

The state proceeded to trial on one count of premeditated murder and one count of felony murder, but the court committed no error in proceeding to verdicts on both counts. *See, e.g., State v. Price*, 46 S.W.3d 785, 824-25 (Tenn. Crim. App. 2000). The state was not required to elect between the alternate legal theories of homicide. *State v. Henley*, 774 S.W.2d 908, 916 (Tenn. 1989). Accordingly, trial counsel did not perform deficiently when he failed to secure such an election, and no prejudice resulted from the failure.

E. Cross-examination of Ronald Eakes.

The petitioner focuses upon Mr. Eakes's testimony that he knew nothing about the crime until he was approached by an investigating officer, and the petitioner claims that counsel should have cross-examined Mr. Eakes about his knowledge of a radio that was taken from the

victim's car. This court, however, can find nothing in the record that illustrates that Mr. Eakes was subject to impeachment or that a different line of cross-examination would have benefitted the petitioner.² Mr. Eakes did not testify in the evidentiary hearing, and no witness supported the present claim about Mr. Eakes's knowledge or vulnerability as a credible witness. Thus, no prejudice has been shown as a result of counsel not cross-examining Mr. Eakes in some different manner. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (“[W]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing”; otherwise, the petitioner is not entitled to relief.).

F. Cross-examination of Alvin Hall.

The petitioner claims that Alvin Hall was influenced to testify against him at trial because Mr. Hall's father, as a probationer, was vulnerable to official repercussion should Mr. Hall not cooperate with the state in its case against the petitioner. The petitioner cites trial counsel's failure to impeach Mr. Hall on the basis of his father's situation as a instance of ineffective assistance. In our view, however, Mr. Hall's possible bias in testifying against the petitioner as a means of avoiding prosecution was far more palpable as a basis for impeachment and was apparent to the jury. At any rate, Alvin Hall did not testify at the evidentiary hearing, and no other witness established that Mr. Hall was influenced by state pressure concerning his father's probation status. Thus, we discern no basis for concluding that the petitioner was prejudiced by this claimed omission of counsel. *See id.*

IV. Conclusion.

The record supports the post-conviction court's denial of relief, and we affirm that court's order.

JAMES CURWOOD WITT, JR., JUDGE

² The record of the post-conviction hearing refers to the trial transcript as an exhibit, but no such transcript appears in the current appellate record.